

U.S. Department of Labor

Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, Ohio 45202
(513) 664-3252 Telephone
(513) 664-6106 Facsimile



DATE: August 21, 1998

CASE NO: 97-JTP- 11

In the Matter of

THE LOWER MUSKOGEE CREEK TRIBE,

Complainant,

v.

U.S. DEPARTMENT OF LABOR,

Respondent,

and

FLORIDA GOVERNOR'S COUNCIL
ON INDIAN AFFAIRS, INC.,

Party-in-Interest.

APPEARANCES:¹

Sid Matthew, Esquire
Gorman & Matthew, P.A.
135 South Monroe, Suite 100
Tallahassee, Florida 32308
For the complainant

Scott Glabman, Esquire
United States Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Suite N-2 10 1
Washington, D.C. 202 10
For the respondent

¹ The Florida Governor's Council on Indian Affairs chose not to enter an appearance in this matter. (Tr. 6).

BEFORE: DONALD W. MOSSER
Administrative Law Judge

DECISION AND ORDER

This case arises under the Native American provisions of the Job Training Partnership Act, 29 U.S.C. § 1501 *et seq.* (JTPA or Act), and the regulations contained at 20 C.F.R. Part 626 *et seq.* **The** JTPA provides funding for job training and employment programs, and Section 1671 of the Act includes Native Americans among the potential beneficiaries of this funding. 29 U.S.C. § 1671. Unlike most funds disbursed by the Act, grants aimed at Native Americans are overseen by the federal **government**, and parties interested in **receiving** such grants apply directly to the Department of Labor, pursuant to Solicitations for Grant Applications published in the Federal Register. *Id.*; 20 C.F.R. §§ 632.10 to 632.11. Grants are made to specified geographic areas, and the recipient oversees the program in those areas. Parties which unsuccessfully apply for grants may request review of the grant officer's decisions by the Office of Administrative Law Judges. 20 C.F.R. § 632.13(a)(4).

Such is the situation here. The Lower Muskogee Creek Tribe (Tribe) applied to be the grant operator for the state of Georgia for the 1997-1998 program years, but was rejected in favor of the incumbent operator, the Florida Governor's Council on Indian Affairs, Inc. (Council). The Tribe appealed this matter to the Office of Administrative Law Judges when the grant officer declined to change his decision after reconsidering the applications. I held a formal hearing in Tallahassee, Florida on March 20, 1998. I gave the parties time after the hearing to resolve an evidentiary issue, then to submit post-hearing briefs. This decision is based on the evidence adduced at the hearing and post-hearing which reflects the evidence the grant officer had at the time he made his decision in this case. 61 Fed. Reg. 48170, 48171 (1996). Evidence and testimony offered at the hearing which was not available to the grant officer is not considered. *Id.*

ISSUE

Whether the decision of the grant officer was reasonable, and not arbitrary and capricious, an abuse of discretion, or not in accordance with the law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As its name implies, the Job Training Partnership Act provides funds to various organizations to provide job training services. Although the funding comes from the United States government, most of the funds are distributed through the states. However, funding for programs aimed at Native Americans bypasses the states and comes directly from the United States Department of Labor's Employment Training Administration because of the historical relationship between the federal government and Native Americans. 29 U.S.C. § 1671. **The**

funds are dispersed geographically, with organizations requesting funds for a particular geographic area. To avoid duplication of services, there can be only one organization providing Native American programs in any area.

Grants under the JTPA are awarded every two years. 20 C.F.R. § 632.10(a). When the appropriate time comes to solicit grantees, the Department of Labor publishes a Solicitation for Grant Applications in the Federal Register, which provides the deadlines and criteria by which interested organizations can apply for the grants. *E.g.* 61 Fed. Reg. 48170. To do so, interested organizations submit a Notice of Intent to the grant officer, following the guidelines in the solicitation. *Id.*; 20 C.F.R. § 632.11(a). If more than one party requests to administer the JTPA grant in the same geographic area, the competing applications are placed in a hierarchical category. 61 Fed. Reg. 48170. If one acceptable party is ranked in a higher category than all other parties, that party receives the grant. *Id.* at 48173. However, if two or more parties fit within the highest applicable preference, the grant process becomes competitive. In such a situation, the grant officer may refer the case to a panel of Federal Officials with special expertise in working with Native American programs to weigh the applications according to criteria in the solicitation. *Id.* (Tr. 37, 63).²

After the panel of experts assigns a score to each application and makes its recommendation, the panel returns the matter to the grant officer, who reviews the recommendation, together with the applications, and issues a decision with respect to which party is deemed to be eligible for a grant. *Id.* (Tr. 39, 61-67). The grant officer is not bound to follow the recommendation of the panel; however, the grant officer is required to award the grant to a qualified incumbent unless a challenger is “significantly superior” to the incumbent. (Tr. 36, 39). This provides continuity of service over the years. (Tr. 99).

The party or parties not chosen for the grant can request the grant officer reconsider the decision. 20 C.F.R. § 632.13(a). The party losing the reconsideration request can then appeal the grant officer’s determination to the Office of Administrative Law Judges. *Id.*

In the application in dispute in the *and-Z?* case, the Solicitation for Grant Applications appeared in the September 12, 1996 Federal Register. 61 Fed. Reg. 48170. It invited parties to submit a Notice of Intent for grants for the 1997 and 1998 program years, and provided the procedure to do so. *Id.* The solicitation provided the criteria for selecting the grantees, which included that a qualifying tribe, band, or group would receive absolute preference on *its reservation* if it had the capability to administer the program and met all regulatory requirements, and noted that this priority applied only to the area within the reservation boundaries. *Id.* For areas outside of reservations, Indian and Native American-controlled organizations, as defined in the Code of Federal Regulations and the solicitation, would be given preference over groups not qualifying

² References to ALJX pertain to exhibits of the Administrative Law Judge. Citations to the transcript of the hearing are indicated by Tr. followed by a page number.

as Indian and Native American-controlled. **Id.** at 48 171. The solicitation also specified that “only information submitted with the Final Notice of Intent, as well as preaward clearances, responsibility reviews, and all regulatory requirements will be considered.” **Id.** In addition, the notice informed prospective applicants that:

The DOL intends to exercise its designation authority to preserve the continuity of [JTPA] services and to prevent the undue fragmentation of existing geographic service areas. Consistent with the present regulations and other provisions of this notice, this will include preference for those Native American organizations with an existing capability to deliver employment and training services within an established geographic service area. Such preference will be determined through input and **recommendations** from the Chief of DOL’s Division of ~~Indian~~ and Native American Programs (DINAP) and the Director of DOL’s Office of Special Targeted Programs (OSTP), and through the use of the rating system described in this Notice. Unless a non-incumbent applicant in the same preferential hierarchy as an incumbent applicant grantee can demonstrate that it is significantly superior overall to the incumbent, the incumbent will be designated, if it otherwise meets all of the requirement for redesignation.

Id

The hierarchy preference established in the solicitation consisted of the following: (1) Indian tribes, bands or groups on Federal or State reservations for their reservation; (2) Native American-controlled, community-based organizations as defined in the solicitation, if they had significant support from other Native American-controlled organizations within the service community, including “tribes applying for geographic service areas other than their own reservations; (3) organizations, either private non-profit groups or units of State or local governments, “having significant Native American control, such as being chaired or headed by a Native American and having a majority membership of Native Americans;” and, (4) non-Native American-controlled organizations. **Id.** at 48 172.

“Native American-controlled, community-based organizations” were further defined as “any organization with a governing board, more than 50 percent of whose members are Indians or Native Americans.” This included tribal governments and public or private non-profit agencies. **Id.** at 48 174. “Community support” was defined as “evidence of active participation and/or endorsement from Indian or Native American-controlled organization with the geographic service area . . .” **Id.** Support letters from individuals, the business community, State and local government offices, and community organizations that were not Indian or Native American-controlled did not meet this definition. **Id.**

The solicitation also gave the factors the review panel would use to rank the competing applications as well as the available points for each category. These factors were:

(1) Operational capacity (40 points).

(a) Previous experience in successfully operating an employment and training program serving Indians and Native Americans of a scope comparable to that which the organization would operate if designated (20 points).

(b) Previous experience in operating other human resources development programs serving Indians or Native Americans or coordinating employment and training services with such **programs** (10 points).

(c) Ability to maintain continuity of services to Indian or Native American participants with those previously provided under JTPA (10 points).

(2) Identification of the training and employment problems and needs in the requested area and approach to addressing such problems and needs (20 points).

(3) Planning Process (20 points).

(a) Private sector involvement (10 points).

(b) Community support (10 points).

(4) Administrative capability (20 points).

(a) Previous experience in administering public funds under DOL or similar administrative requirements (15 points).

(b) Experience of senior management staff to be responsible for a DOL grant (5 points).

Id. at 48173.

Two organizations responded to the solicitation in question and requested authority to provide services in Georgia: the Florida Governor's Council on Indian Affairs and the Lower Muskogee Creek Tribe. (Tr. 41). The Council is the incumbent; it has provided JTPA services in Georgia since 1989. (ALJX 10 at E95). It also has a great deal of experience, not just in Georgia, but also in Florida, where it has been the JTPA grantee for all but four counties of the state since 1976. ***Id.*** It is a non-profit corporation established by proclamation of the Governor, but incorporated as any other non-profit. ***Id.*** Its board of directors includes four representatives from each of Florida's two federally recognized Indian tribes, and seven other members who at

the time of the application were a mix of other Native Americans and others. (*Id.* at E95, E125). The grant officer determined that the Council fell in hierarchy category 2. (Tr. 40).

The Tribe is a state, but not federally, recognized Indian tribe, based in southwest Georgia. (*Id.* at E16; Tr. 79). The Tribe has never been a JTPA grantee, although it did have several federal grants during its unsuccessful attempt to become federally recognized, and also has a Health and Human Services grant through which it distributes food stamps and housing assistance. (ALJX 10 at E5-6). Several of the Tribe's administrators have JTPA grant or similar experience, and the Tribe proposed to hire additional experienced staff if it received the grant. (*Id.* at E5, E37-48). The Tribe also fell in hierarchy category 2 as it was applying for off-reservation areas. (Tr. 40, 80).

The grant officer referred the applications to a review panel, which reported total scores with respect to the Council's application of 68.3³ and 49.3 for the Tribe's application. (ALJX 11, 12). A key consideration in the panel's scores was the Tribe's lack of JTPA experience and the Council's extensive experience with the Act. *Id.* This experience, or lack thereof, was in the organization, not in the individuals who would be administering the programs. (*Id.*; Tr. 42, 44-55, 70, 82-83). Other factors that the panel appeared to find relevant were the Council's lack of an extensive presence in Georgia, its low rate of disallowed costs after an audit, and its more detailed application. (ALJX 11, 12). On the Tribe's side, the experience of the proposed staff and its identification of needs were positives, but the relative lack of experience in running training programs, lack of running a statewide program, and lack of details in its application were drawbacks. *Id.*

The grant officer and his staff reviewed the two applications and the panel's recommendation. (Tr. 55, 73). In addition, the grant officer had the opportunity to consider the record of the Council, including its results after audits and any complaints that may have been filed against the Council in its administration of the JTPA over the preceding years. (Tr. 56, 62, 84-85). While the grant officer did not specifically request information on these topics from the branch of the Department of Labor that oversees the administration of these programs, this information would have been brought to his attention. (Tr. 84, 87). He knew of no complaints that had been filed against the Council, and the Tribe did not identify any complaints. After his review, the grant officer decided to follow the panel's recommendation. Therefore, he awarded the grant to the Council.

The Tribe requested a debriefing of the reasons it was not chosen, and discovered that it had misinterpreted the solicitation for grants. (ALJX 10 at B16-19). The Tribe then requested reconsideration of the grant officer's decision, but upon reexamination, the grant officer again found the Tribe was not significantly superior to the Council. (*Id.* at A8; B17-19). He therefore

³ As correctly noted by respondent's counsel, the Council's subtotals actually amount to 68.2. However, the .1 error in the total considered by the grant officer did not affect his ultimate decision. (ALJX11).

refused to change the grant. (Id. at A8). The Tribe then appealed the grant officer's determination to the **Office** of Administrative Law Judges.

At the hearing, the Tribe attempted to portray the Council as unresponsive to the needs of Georgia Native Americans and unsupported in Georgia, while portraying itself as being considerably more responsible. Indeed, some evidence in the record indicates that the Council prefers Florida-based Native Americans over those in Georgia based on their preference criteria, and there is no Georgia representation on the Council's Board of Directors. (Id. at E1 1, E 138). The Council has no **office** in Georgia, instead serving Georgia, as it does most of Florida, through the use of an 800 **number**.⁴ (Id. at E108). The Tribe also tried to show that it had experience with job training programs through its experienced staff and its other grants. (Id. at E1 -92).

The Tribe also attempted to prove that the Council was spending money allocated to Georgia in Florida. However, under the JTPA, money is not allocated to a specific state, but rather to a designated region which might include more than one state, and the grantee has responsibility for allocating it within its region. (Tr. 95). Thus, there is no money earmarked for Georgia in the Council's grant, although the Council would be expected to use a reasonable proportion of the grant in Georgia, as approximately twenty-eight percent of the Council's grant is allocated on the basis of the Native American population in Georgia. (Tr. 57).

Discussion

Unlike most administrative hearings, the Act and regulations curtail much of my power. My role in this matter is simply to review the evidence available to the grant officer at the time he made his decision, and determine whether his decision was not "arbitrary and capricious, an abuse of discretion, or not in accordance with the law." *County of Los Angeles Community and Senior Citizens Services v. U.S. Department of Labor*, 87-JTP-17, 2 Decisions of the **Office** of Administrative Law Judges and **Office** of Administrative Appeals, No. 2, p. 136, 137 (ALJ June 29, 1988). Obviously, an abuse of discretion standard presents a high threshold for an opposing party to overcome. It occurs when a **decision** is based on "an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990). I **further** reiterate that the only evidence I can consider is that made available to the grant officer at the time he made his decision. If I find his decision reasonable, I must uphold it, even if I disagree with it. It also is important to remember that to succeed, the Tribe must also show that it is "**significantly** superior" to the Council. 61 Fed. Reg. at 48171. Thus, counsel for the Tribe was certainly correct when he noted "I'm up against a loaded ... deck." (Tr. 27).

⁴ The Council did indicate in its application that one of its part-time Training Coordinators was moving to Atlanta in January of 1997, but no evidence was offered at the hearing as to whether this took place or whether the move was due to the Council's direction or fortuitous. It also reported that the staff member would not require an office or support personnel. (ALJX 10 at E1 07).

To mix metaphors, the Tribe attacked this loaded deck on a variety of fronts. The first claim raised by the Tribe is that the grant officer erred when he did not give the Tribe a higher hierarchy ranking than he gave the Council. The Tribe claims that it should have been given absolute preference over the Council, at least within the boundaries of its reservation. (Brief of Complainant Lower Muskogee Creek Tribe at 10.) However, the Tribe's lands are not a federal reservation, and the record does not prove the grant officer had any evidence before him to indicate that it was a state reservation either. (Tr. 128). Furthermore, even if the grant officer had been aware that the Tribe had a state reservation, the reservation was too small to claim the absolute preference the Tribe attempts to claim. In this case, the service area would be restricted to its reservation, but to be a new grantee under the JTPA, the service area must include over 1,000 Native Americans. 20 C.F.R. § 632.1 O(b)(3). The Tribe does not meet this requirement. (Tr. 80). Thus, the absolute preference does not apply.

The Tribe also did not apply solely for its reservation, but rather requested the entire state of Georgia. The regulations and the solicitation clearly explain that the preference applies *only* to the reservation. 61 Fed. Reg. at 48170. The Tribe also argues that because the Tribe has recognition statewide, the preference not only should apply, but should apply statewide. Not surprisingly, the Tribe can cite to no information supporting this claim, as there is nothing in the statute or regulations that supports it. Simple logic shows how erroneous it is. Based on the Tribe's logic, if there were two state recognized tribes, both would receive an absolute preference over the other statewide, which is an impossibility. Thus, it is the Tribe's first argument, not the grant officer's decision, that is clearly erroneous. This argument, obviously, fails.'

⁵ There is one matter that causes me some concern although I am precluded from rendering findings of fact or conclusions on it because it was not raised by the Tribe or addressed by the parties. 20 C.F.R. § 636.10(a)(3). I discovered in reviewing the preferential hierarchy and the evidence in this record that category 2, where both the Council and the Tribe were placed, is reserved for "Native American-controlled, community-based organizations . . . with significant support from other Native American controlled organizations within the service community." 61 Fed. Reg. 48172 at Part IV(2). (Emphasis added). Furthermore, "*The applying organization must supply sufficient information to permit the determination [regarding hierarchy] to be made. Organizations must indicate the category which they assume is appropriate and must adequately support that assertion.*" *id* at 48172-48172 (emphasis in original). As noted above, community support requires "evidence of active participation and/or endorsement from Indian or Native American-controlled organizations within the geographic service area for which designation is requested."

The Council addressed the hierarchy preferential question by reporting its community support "is evidenced by the make-up of the Florida Governor's Council on Indian Affairs, Inc., Board of Directors" which requires at least eight Indian members, all of whom must be from the Florida Seminole and Miccosukee tribes, and seven at large members, all of whom were from Florida at the time of the application. (ALJX 10 at E100, E111). In addition, it indicated that all of the members are appointed by the Governor of Florida. (ALJX 10 at E 117, E125, E129). The Council also submitted two endorsement letters purporting to show community support. (ALJX 10 at E 109). These letters came from the Seminole Tribe of Florida and the Poarch Band of Creek Indians, located in Alabama, although the Council's application indicates that a third of the Poarch live in Florida and "several" live in Georgia. (ALJX 10 at E 100, E 165, E 166). There is some question in my mind as to whether "several" meets the "significant support" requirement of the regulation.

The Council's application also contains some information that might be considered evidence of active participation of other Native American-controlled groups. This consists of a statement made by the Council in its

The Tribe's second claim was that the grant officer erred when he determined the Tribe was not significantly superior to the Council. Yet a review of the criteria by which the two parties were judged shows this is not the case. The first area was operational capability, and in the panel's decision, was worth a potential forty points: twenty based on the organization's previous experience in operating employment programs, ten from experience in operating other human resource development programs, and ten **from** an ability to maintain continuity of services already being provided under the JTPA.

The Tribe **faired** badly in this area, scoring only 20.3 points. Most of the difference between the Tribe's score and the significantly higher score of the Council came in the first sub-area, previous experience in employment and training programs. Here, both groups had experienced personnel, but the key factor was the experience of the organization. (Tr. 44). While individual experience is valuable, experience as an organization is also key. Many talented individuals do not always result in a talented organization. Therefore, the grant officer also looks to the experience of the organization.

I conclude that the grant officer correctly found that the Tribe lacks organization experience in job training programs. The Tribe's application does not show experience in employment and training programs. Furthermore, the panel was also correct when it noted that the Tribe did not have a staff in place that could handle the JTPA program, but would have to hire several additional employees, while the Council's staffing was already in place. While the panel did note that the Council lacked an extensive establishment in Georgia, and had other programs, the grant officer found these offset by the experience of the Council and the inexperience of the Tribe. Therefore, I find that he had a rational basis for his decision.

I should also mention regarding the review panel's conclusions on the experience' of the Tribe's staff, that the Tribe's chief testified there "are people that are in our tribal office on a daily basis that volunteer their time and they are there eight to twelve hours a day that have

application mentioning three groups with which it participates: the Native American Outreach Forum, the Indian Affairs Task Force, and the Native American Youth Program. (ALJX 10 at E99-100). The Native American Outreach forum is an organization created by the Council whose primary effort appears to consist of mass mailings and occasional meetings when budgetary constraints permit. (ALJX 10 at E99). In essence, it appears that the Council is participating with itself rather than with other Native American-controlled groups. The Council explicitly does not have an endorsement from the Indian Affairs Task Force, so any work with this group does not evidence community support. (ALJX 10 at E99). Finally, the Native American Youth Program is actually the Florida Indian Youth Program, which takes place in Florida, although one meeting a year is held in Georgia. (ALJX 10 at E 100). Again, this appears to be a part of the Council rather than participation with other groups.

I finally note that while the Council's information certainly shows community support in Florida, it appears to me that the pertinent service area is Georgia. I therefore have some reservation as to whether the Council provided the grant officer with sufficient information to prove significant community support in the critical service area. If properly raised, such a deficiency in the application could cause one to question whether the Council should have been designated as category 2 in hierarchy preference.

administered these types of programs and we have submitted their resumes.” (Tr. 113). Such evidence does not prove the Tribe is operating any sort of training program, merely that people in the Tribe may have run such programs in the past, and thus it goes to the experience of the individuals rather than the experience of the organization. Moreover, this evidence, other than the resumes, was not available to the grant officer at the time he rendered his decision and thus cannot be relied on by me in rendering mine.

The Tribe did outshine the Council in its experience with other, non-employment human resources programs, thanks to its experience with Health and Human Services programs. However, this factor was given lesser weight than experience with employment and training programs, **as** these programs directly relate to the JTPA funds. I agree that this is a reasonable distinction.

The panel faulted the Tribe under the third subheading, ability to maintain continuity of services. Although the Tribe disagreed with this determination, I find the grant officer had a reasonable basis to accept the panel’s determination. It is true that the Tribe did describe, in general terms, their plans to open three state wide **offices**. I find it significant, however, that the Tribe did not provide any discussion regarding the details of how it intended to maintain services to current enrollees. The Tribe’s plans for new offices do not explain how existing services would continue to be provided to the existing enrollees. Also, the plans for identifying needs and expanding a statewide delivery system do not specify how the Tribe intended to maintain the delivery system already in place. The Council clearly had delivery systems set up for the Georgia enrollees, which it would merely be required to continue. In this respect, I find that the Council’s lack of a physical presence in Georgia does not count against them, as they were already providing services in that area. In light of all this, I find a reasonable basis existed for the grant officer to accept the panel’s determination.

The second criterion on which the panel evaluated the applicants also came out in favor of the Council. Regarding the identification of training and employment problems and the approach to solving them, the panel gave the Tribe a score of 9.7 and the Council a score of 13 out of a possible 20 points. The **panel** afforded the Tribe an advantage in its **discussion** of need, recognizing that the Tribe had done work to **identify** employment barriers and had generalized plans to provide special outreach, recruitment, assessment and evaluation of participants. However, the panel found the Tribe lacked experience in running employment programs, that the Tribe’s application did not address its plans to serve the urban population, and that the Tribe intended to refer applicants with special needs to state programs that appeared to have a poor track record with training Native Americans. The Council did not fare as well when it came to addressing problems, but received a higher mark as the result of its on-going review system, individualized approach to each participant, and its dual methods of operation. The panel was concerned that the Council did not discuss its results under previous grants and its **one-central-office** approach which ran the risk of having participants fall through the cracks.

Although I find the panel's analysis on this point less than ideal — the panel did not address the Council's practice of also referring participants to state agencies nor that the Council's "project" method of operation had been used only in Florida — I also find it reasonable. The panel was correct that the Council gave more details of how it intended to deal with the identified problems. While the panel was concerned about the Council's use of one office, it was also unaware of any specific problems or complaints or of any individuals who had fallen through the cracks. In contrast, the Tribe certainly identified problems, but did not give as many details on how it intended to deal with them. The Tribe also did not specifically address how it intended to serve participants in urban areas. None of the three offices it intended to set up was to be located in an urban area, although a significant portion of potential participants live in these areas. (ALJX 10 at E13). Thus, I find the panel's rating, and the grant officer's adoption of the panel's recommendation, were neither arbitrary nor unreasonable.

The third area examined by the panel consisted of the planning process of each applicant. Here, the Tribe received a score of 8.6 out of twenty, while the Council received a 12. This factor had several subparts, the first of which was private sector involvement for which the Tribe received only a 3.3 out of a possible ten points. The panel felt in this regard that although the Tribe had shown some minimal indications of support from letters of support prepared by two Chambers of Commerce and announced an intent to develop a statewide advisory council, this was inadequate. The panel noted that there were no private sector links other than letters of support. It also concluded that the proposed council would be advisory while actual decisions would be made by the Tribe's board of directors. It further found that knowledge of the Tribe's existence appeared to be limited, the Tribe did not discuss the eligibility criteria or decision making process it would use to determine who qualified for JTPA assistance, and the Tribe did not indicate how other Indian or program support groups would be selected.

I believe the panel was correct in evaluating the Tribe under this factor. The Tribe did not discuss how it would decide who qualified for services, a point which was shown through the hearing to be a controversial matter. The Tribe also did not show any promises of support — the chamber of commerce letters were essentially letters wishing the Tribe well in its application — or concrete plans on how it intended to involve the private sector in the program. The Tribe's experience working with state and local service agencies on other projects does not demonstrate the involvement of the private sector in job training and employment programs. As most jobs are with the private sector, not service agencies, the lack of detail and experience in this area was a reasonable concern. I also find it was reasonable for the panel to be concerned that the council would be only an advisory body with all decisions deferred to the Tribe. The application was unclear whether the advisory council would have any real oversight powers. (ALJX 10 at E10). Contrary to allegations of the Tribe, the panel did not perceive the advisory council as unviable, but rather as too limited. While the panel could have acknowledged that the Tribe had attempted to provide a rough framework of its ideas on how the program would be structured, its failure to do so was not unreasonable as these ideas were so lacking in detail as to be more aspiration than plan.

Contrasting the Tribe's application on this factor, the Council broke down exactly how its planning process works, and included examples. It also showed how it receives input from state agencies and various tribes, and described the existence of a Native American Outreach forum. The panel's crediting of these items was reasonable, as was its criticism of the lack of a showing of private sector support or involvement locally and the Council's apparent exclusion of program participants from the planning process. The panel correctly found that the Council did not identify private sector support in Georgia, but felt that the Council's experience in Georgia and overall planning process was superior to the Tribe's. While the panel went beyond the listed criteria for this point, considering the question of eligibility criteria and the planning process itself, it did this for both applications and did so reasonably. Thus, I find the panel's ratings on this point overall, as well as the grant officer's decision in accepting them, to be reasonable.

I find the panel did err, and thus the grant officer erred in accepting the panel's rating, regarding community support. The panel first erred when it credited the letter in support of the Tribe from a community college, despite the lack of any indication that this is a Native American-controlled organization, as required by Part VIII(3) of the application solicitation. 61 Fed. Reg. 48174. (ALJX 10 at E57; ALJX 12 at page 6). However, the panel was correct in not taking into account the letters of support for the Tribe from Georgia politicians and state agencies. (ALJX 10 at E50-E53; ALJX 12 at page 6). In addition, the panel was correct in noting the letter of support from the Eastern Cherokee, which belies the panel's conclusion that the Tribe's support was confined to only southwest Georgia. (ALJX 10 at E54; ALJX 12 at page 6). However, the panel's concerns about limited statewide support were reasonable. (ALJX 12 at page 6). The panel also erred in evaluating the Council's application in this area. The two letters in support of the Council noted by the panel are from Florida and Alabama rather than Georgia. (ALJX 10 at E 109, E 165-E 166). However, based on the record before both the panel and the grant officer, I believe they were correct in crediting the Council's attempts to develop community support in Georgia. The panel also correctly noted the lack of expressed support for the Council and the lack of any advisory input from Georgia. (ALJX 11 at page 6). Thus, I find the panel made two errors in its analysis on this point, but I conclude that if the panel had not erred, the Tribe would only have scored one point higher, at best. Thus, these errors did not substantially affect the reasonableness of the panel's overall recommendation or the grant officer's ultimate decision.

The final criteria on which the two applicants were evaluated involved their administrative capability. Again, this criterion was divided into subparts, the first of which dealt with each applicant's previous experience in administering public funds. Although the panel acknowledged that both applicants had experience in dealing with public funds, the Council received higher marks because of its more extensive experience in dealing with these funds and its excellent audited results. The Tribe's marks were lower because its experience in administering public money was much more limited and nothing in the record indicated that it had ever undergone an audit or performance evaluation. The Council's score was lowered because of the panel's concern about the lack of information explaining how the money spent in Georgia was meeting Georgia program needs. (ALJX 11 and 12 at pages 7). The grant officer apparently

also lacked this information in making his decision as he testified that he had only acquired this knowledge in anticipation of the hearing. (Tr. 93). However, the lack of this information was accounted for in the panel's scores, and thus I find the grant officer's final decision was reasonable.

The next subpart dealt with the experience of senior management. The panel ranked the Tribe only slightly lower than the Council because the Council's management was fixed while the Tribe would need to hire several key staff members. (ALJX 11 and 12 at pages 8). A review of the record shows that the two staffs were similar in experience, and thus I believe the panel's ratings were reasonable.

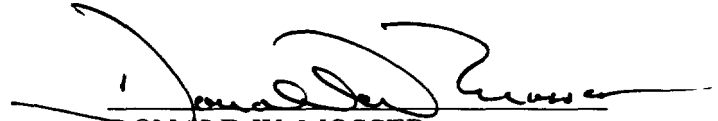
Overall, I find the panel's scores to be reasonable, with the exception noted above, and even with that exception, I find the panel's recommendations were reasonable. The Tribe argues that even if the panel's recommendations were reasonable, the grant officer still erred when he accepted them because the Council's performance had been unsatisfactory and denied service to Native Americans in Georgia. However, the record before the grant officer did not reflect this. Even in its brief, the only evidence the Tribe cites to is the testimony of its Chief, which was not before the grant officer when he made his decision. While the hearing record shows the Tribe may have legitimate concerns, this proceeding is not the proper forum to raise them. Rather, the Tribe, or for that matter any group or organization whose members believe they are being treated unfairly in the application process, should file a complaint with the Department of Labor as provided in Part 636 of Title 20 of the Code of Federal Regulations. Not only does that agency have the authority to deal with the type of allegations made by the Tribe, but an official complaint would serve as a record of potential problems with the Council's administration of the funds in question when future grants are awarded.

The final argument of the Tribe is that I should find the applicable provisions of the JTPA unconstitutional. As an administrative law judge I lack the authority to declare a law unconstitutional. However, as the Tribe makes only a bare allegation of unconstitutionality, without any supporting argument, even if I had such power I could not and would not agree.

In conclusion, the Tribe is the victim of a rational regulatory preference for incumbents. The criteria that flow from that preference affords higher marks to experienced participants with an additional burden that the Tribe prove not only that it's better than the Council, but "significantly superior." Added to this hurdle are the Tribe's admitted errors in preparing their application, its lack of experience as an organization in job training programs, and its lack of detail in their submitted application. None of these, nor the points raised by the Tribe to the grant officer, convinces me that the grant officer's decision was unreasonable, arbitrary, or an abuse of discretion. That decision is reasonable in view of the record he had available to him at the time he made his decision. Furthermore, I concur with the grant officer that the information made available to him does not demonstrate that the Tribe is significantly superior to the Council. Thus, the grant officer's decision is affirmed.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the request by the Lower Muskogee Creek Tribe that the March 1, 1997 decision of the grant officer be reversed is denied.



DONALD W. MOSSER
Administrative Law Judge